BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TINA HOLLIMAN	)	
Claimant	)	
	)	
VS.	)	
	)	
ARMOUR SWIFT-ECKRICH	)	
Respondent	)	Docket No. 1,004,645
	)	
AND	)	
	)	
CONAGRA FOODS REFRIGERATED FOODS CO., INC.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the December 2, 2005 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. Pursuant to the parties' agreement, the case was placed on the Board's summary docket for a determination without oral argument and deemed submitted as of May 1, 2006.

APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, represents the claimant. Mark E. Kolich, of Lenexa, Kansas, represents respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ concluded the claimant did not "deserve" work disability benefits because she "abandoned her employment without any good cause."[1] Thus, her award was limited

[1] ALJ Award (Dec. 2, 2005) at 2.

to a functional impairment. The ALJ went on to assign a 5 percent permanent impairment for claimant's cervico-thoracic spine complaints.

The claimant requests review of the nature and extent of her permanent partial impairment and contends the ALJ's Award should be modified. Claimant maintains that the preponderance of the credible evidence establishes that she is not only entitled to more than the 5 percent permanent partial impairment assessed by the ALJ, but that she has sufficiently established a work disability under the provisions of K.S.A. 44-510e(a). Specifically, claimant suggests that her decision to leave work was reasonable and appropriate under the circumstances. And that decision should not be considered a lack of good faith thus precluding her from her request for work disability benefits.

Respondent argues that the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent on October 14, 1997. Her job was as a pre-tuber in which she was to put casings in a tube to be filled with sausage. Claimant also had to lift buckets with water, intestines and tubes in them that weighed between 32 and 60 pounds. There is no dispute that while performing this job, claimant began to experience pain and discomfort in her neck, shoulder, upper back, lower back and both wrists. Respondent provided treatment through various physicians, including Dr. Daniel T. Hinkin. Claimant's treatment began in 1999 and was conservative in nature, including physical therapy, medications, injections and modified work duties.

During the course of her treatment, Dr. Hinkin imposed restrictions on claimant's work activities. In December 2000, these restrictions included "task rotation, limit repetitive push/pull five to 10 pounds, breaks 10 minutes per hour for stretches, wrist breaks as needed."[2] Claimant testified these restrictions were accommodated. On March 26, 2002, claimant's restrictions were modified and stretch breaks were to be taken 3 times per day.[3] As of February 20, 2002, claimant's last day of work, claimant testified that she was under restrictions which compelled her to have stretch breaks 3 times per day.[4] She understood

[2] R.H. Trans. at 12.

[3] Cordray Depo., Ex. D.

[4] R.H. Trans. at 13.

that these stretch breaks were to be taken *in addition to* her normal breaks.[5] But she concedes there is no written documentation of this directive.

The circumstances of her departure from respondent's employment are in dispute. Claimant testified that at times she was not allowed to take her stretch breaks and her normal breaks during a workday. When she did, her supervisor, Paul Perry, disciplined her for taking excessive breaks. According to claimant, Mr. Perry neither cared nor agreed with the restrictions that had been imposed by Dr. Hinkin.

Claimant went on to explain that there was, in her view, a high turnover of supervisors and as a result, her restrictions were inconsistently honored. When there was a problem with her taking extra breaks she just went into the HR office and after discussing the issue, her supervisor would be informed of her situation and then everything would be all right.[6]

On February 20, 2002, claimant was going to take her lunch break at 9:30 a.m. and was told that she would have to wait until 1:30 p.m. due to a birthday celebration. Claimant told her supervisor that she needed a stretch break because she was in pain. Again claimant was told that she had to wait. Claimant testified that:

> I was in pain. I just lost it. I couldn't think clearly. I got upset. I decided I needed to leave.[7]

Claimant returned within a few days to discuss the situation with the safety leader. She stated that she did not know why it was all of a sudden not okay for her to take extra breaks. The respondent's paperwork indicated claimant "walked off the job".[8] That same document indicated claimant was upset because claimant's supervisors determined that the birthday dinner celebration would be considered her lunch break and that claimant wanted a 30 minute lunch break in addition to time away from work to attend the celebration.[9]

Claimant's employment was terminated as respondent considered her to have abandoned her job. Since that date, claimant attended a beauty school (beginning in early August 2005. She has sought approximately 40 jobs since February 20, 2002 and the date of her regular hearing (October 13, 2005) although she does not have a list of the places

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[5] *Id.* at 14.

[6] *Id.* at 44-45.

[7] *Id.* at 18.

[8] Cordray Depo., Ex. C.

[9] *Id.*

where she applied. She works 6-8 hours per week at the American Legion while going to school and earns $30-40 per week at an hourly rate of $7.00 per hour.

At her lawyer's request, claimant was evaluated by Dr. Peter Bieri, on July 2, 2004. He testified that claimant suffers from a cervical and lumbar strain as well as the general results of an overuse syndrome/cumulative trauma disorder, all attributable to her work for respondent from August 4, 1999 to February 20, 2002. He rated her as having a 16 percent impairment to the whole body, which is comprised of a DRE category II (5 percent) permanent partial impairment to the cervicothoracic and lumbosacral areas, 7 percent to the right upper extremity and 2 percent to the left upper extremity.[10] While he concedes claimant's diagnosis is based primarily upon her subjective complaints, he testified that his examination revealed some muscle spasms and guarding at the extremes of her active range of motion. He also imposed restrictions which limit occasional lifting to 35 pounds, frequent lifting not to exceed 20 pounds, and no more than 10 pounds of constant lifting.

Based upon a task analysis prepared by Monty Longacre, Dr. Bieri opined that claimant has lost the ability to perform 33 of 39 tasks. Mr. Longacre testified that claimant has the capacity to earn $6.25 per hour as a telephone sales person or as a counter attendant in a video or jewelry counter. Such jobs would earn $250.00 per week.

In contrast to this testimony was that offered by Terry Cordray, a vocational counsel retained by respondent to provide a task analysis and comment on claimant's capacity to earn wages. Mr. Cordray suggested claimant could do retail sales, custodial work, production work and drive a school bus. He testified claimant could expect to earn $9.50 per hour, working full-time, plus fringe benefits.

Claimant was also directed to see Dr. James S. Zarr for an examination which took place on September 14, 2005. Dr. Zarr also noted claimant's subjective complaints of bilateral arm, neck and low back pain. He diagnosed myofascial low back and neck pain along with right shoulder pain. Dr. Zarr rated claimant's neck and upper back as a DRE category II (5 percent) and if her low back was considered as part of the claim, then that condition also warranted a DRE category II (5 percent) permanent partial impairment.

Dr. Zarr expressed some concern that claimant's back complaints did not emerge until after she left respondent's employ in February 2002. According to Dr. Hinkin's medical records, claimant made no low back complaints until June 2002 and even then, she made those complaints in connection with some physical therapy which was designed to manipulate the thoracic spine to mobilize the T7 area of the spine.[11] According to Dr. Zarr, that sort of therapy would not be a competent producing cause of low back pain

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[10] All ratings are to the 4th edition of the AMA *Guides*.

[11] Zarr Depo. at 10-11.

complaints. Dr. Zarr went on to testify that claimant had no restrictions and therefore, when considering Mr. Cordray's task analysis, no task loss had occurred.

The ALJ was more persuaded by the functional impairment opinions expressed by Dr. Zarr as he noted Dr. Zarr saw claimant more than a year after Dr. Bieri and that "his evaluation presents a better picture of the [c]laimant's disability."[12] In doing so, the ALJ expressly concluded that the low back complaints were not part of this claim, limiting claimant's recovery to her cervicothoracic complaints which, in both physicians' view, warranted a 5 percent permanent partial impairment.

The Board has reviewed the record and considered the parties' arguments and finds no reason to disturb the ALJ's conclusion on this issue. The ratings relative to claimant's neck complaints are the same. As for the back, the ALJ agreed with Dr. Zarr and found it was not causally related to claimant's work. Claimant's medical records do not contain any mention of her low back complaints until over 4 months after she left respondent's employ. Under these facts and circumstances, the Board affirms the ALJ's functional impairment finding of 5 percent to the cervicothoracic area.

When, as here, an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

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[12] ALJ Award (Dec. 2, 2005) at 3.

That statute must be read in light of *Foulk*[13] and *Copeland*.[14] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

In addition, the Kansas Appellate Courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to *continue* their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[15] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[16]

In this instance, the ALJ concluded that claimant failed to demonstrate good faith when she left work on February 20, 2002 over what he described as a "huff"arising out of her unwillingness to delay her lunch break. After a close review of the evidence contained within the record, the Board agrees with the ALJ's finding. Although claimant maintains that she was under a physician's directive to take 3 stretch breaks per day *in addition to her regularly scheduled breaks*, there is no documentation within the record to substantiate this. While there is a physician's note that is dated March 26, 2002, this is *after* claimant left respondent's employ. And that document only indicates claimant was to take 3 breaks per day. According to claimant's own testimony, on her regular schedule she was given 3 normal breaks per day, 2 hours apart. The first and last were 15 minutes each and the middle one was 30 minutes for lunch.

Claimant's decision to leave her position on February 20, 2002 was inappropriate. Furthermore, since that day, she has not requested that respondent reinstate her. There

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[13] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[14] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[15] See, e.g., *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

[16] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

was a conversation with the safety leader but there is no indication she asked for her job back.

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.[17] An employee is not required to seek post-injury accommodated employment with the employer in every case.[18] An employee may be entitled to a work disability after seeking other employment when the injury prevents him or her from continuing to perform his or her job duties for the employer.[19] Under these facts and circumstances, the Board finds the ALJ did not err in concluding that claimant failed to prove a good faith effort to retain her position with respondent. Accordingly, the ALJ appropriately imputed to her a post-injury wage based on her accommodated job with respondent. This wage exceeded 90 percent of her pre-injury average weekly wage which limits her recovery to the value of her functional impairment.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated December 2, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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[17] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

[18] *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001).

[19] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P. 2d 288, *rev. denied* 267 Kan. 889 (1999).